In The Supreme Court

Appeal from the Court of Appeals
Presiding Judge, Jessica R. Cooper

ANTONIO CRAIG, minor, by his
Next Friend, Co-Conservator and Mother,
KIMBERLY CRAIG,

Plaintiff-Appellee

Docket No. 121405

vs.

Court of Appeals Case No.: 206951

OAKWOOD HOSPITAL,
a Michigan Corporation

Wayne County Circuit Court
Case No.: 94-410338 NH
Hon. Carole F. Youngblood

Defendant-Appellant

and

HENRY FORD HOSPITAL d/b/a HENRY FORD HEALTH SYSTEM, a Michigan Corporation, ASSOCIATED PHYSICIANS, P.C., and ELIAS G. GENNAOUI, M.D.,

Defendants - Appellants

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BRIEF ON APPEAL - BY PLAINTIFF-APPELLEE IN RESPONSE TO DEFENDANT-APPELLANT HENRY FORD HEALTH SYSTEM

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

The jurisdictional summary in Henry Ford's Brief fails to conform to MCR 7.212(C)(4)(a)which requires that it identify the actual legal basis for jurisdiction, which in this case is MCR 7.302(F)

STATEMENT OF QUESTIONS PRESENTED

I. Whether the trial court erred in finding Henry Ford Hospital liable on a successor theory?

The trial court answered: No.

The Court of Appeals answered: No.

Plaintiff-Appellee answers: No.

Henry Ford answers: Yes.

I. INTRODUCTION

Appellant Henry Ford Health System, a Michigan Corporation, which is also known by its assumed name Henry Ford Medical Center-Taylor ("Henry Ford"), has completely omitted the following critical aspects and documents from the successor portion of this case:

(1) Henry Ford's motion in the lower court to sever itself from this Action (not mentioned in Henry Ford's Brief or Appendix)

(2) The January 10, 1997 lower court motion hearing transcript on the issue of severance. (Not included in their Appendix, Relevant Docket Entries or Brief) Henry Ford on the record agreed to "waiving all rights" and to "waive all rights to a jury trial and any factual issues," [7b, lines 11-22] and also agreed to NOT having any other judge or court "oversee" the successor liability issue. [8b, lines 17-24]

(3) The January 10, 1997 Order To Sever as drafted by the attorney for Henry Ford. (Not included in their Brief or Appendix)

(4) Plaintiff's bench trial Exhibit J, which revealed that the "Henry Ford Medical Center-Taylor was made an Assumed Name for Henry Ford Health System as of April 1, 1987." The exhibit was admitted on the record at the bench trial held in this matter [310a, lines 14-17], yet any mention of the name was completely avoided and omitted from Henry Ford's Brief, Appendix, and Successor Liability and Trial Proofs Flowchart. Henry Ford's Appendix's Table Of Contents falsely states on its face that

it includes: "Plaintiff's successor trial exhibits." (Exhibit J was not included in their Brief or Appendix)

(5) Plaintiff's bench trial's Exhibit A, contrary to what is erroneously stated in Henry Ford's Table of Contents, was a complete four hundred and seventeen (417) page copy of the plaintiff's out-patient medical records received after a subpoena was sent to"Henry Ford Medical Center - Taylor F/K/A Associated Physicians." [22b] The "Record Certification" is signed, dated 1-2-96, by J. Lundy, on behalf of "Henry Ford Medical Center - Taylor F/K/A Associated Physicians" Exhibit A was numbered from pages W to W417 and was admitted in its entirety. [306a, line 21] The Exhibit sticker A was placed on page W at trial. [22b]

(6) In addition to completely omitting any reference to Henry Ford Medical Center, Henry Ford's FLOW CHART on page 6 of its Brief has no arrow or connection whatsoever between Associated Physicians, P.C. and Associated Physicians Medical Center, Inc.

(7) Despite making the request repeatedly, defendant-appellant Henry Ford has indicated that no purchase agreement exists for its total stock purchase of Associated Physicians. Henry Ford admits in their Brief that it did purchase all the shares of Associated Physicians, Inc. (Henry Ford Brief, p. 4) Instead of producing the Purchase Agreement, they produced an affidavit at trial of Daniel Share, an attorney who they hired years ago to handle putting the sequence together.

II. COUNTER STATEMENT OF FACTS

A. The Successor Sequence: An Acquisition by cash stock purchase of a sub, followed by Dissolution of the sub, leaving an assumed name of the purchaser to continue the enterprise. [23b]

The Henry Ford Medical Center in Taylor used to be Associated Physicians Medical Centers, Inc., which used to be Associated Physicians Medical Center, which was a name utilized by Associated Physicians, P.C. on their letterhead and with the public. [341a]

1. Associated Physicians Medical Center, a professional services corporation.

It is admitted by defendant-appellant Henry Ford, at pages 3-4 of their Brief, that at the time that the malpractice claim arose on 7-16-80, defendant Dr. Gennaoui was employed by Associated Physicians, P. C., which is described in Henry Ford's Brief as a "medical clinic." [Henry Ford Brief, p. 4, "for their medical clinic"] The nature and type of business in which the corporation was engaged was listed as "Practice of Medicine & Surgery." [342a-343] Associated Physicians, P.C. filed annual reports as a Profit Corporation [342a] and had been incorporated on January 25, 1966 under former statute, Act No. 192 of the Public Acts of Michigan of 1962. [356a] [369a] Its incorporation number was 021484, its address was 24555 Haig, Taylor, MI, 48180 and its phone number was 295-4200. [341a-342a] Prior to 1986, Associated Physicians was doing business as, and holding itself out to the public as, "ASSOCIATED PHYSICIANS MEDICAL CENTER." [For example, 341a, entries top and bottom] The President was John Casey, M.D. [346a]

It is uncontested that prior to 1986, Antonio Craig was a regular patient at both Associated Physicians, P.C. [341a, 32b] and Henry Ford Hospital. [33b, 34b] Antonio had a Henry Ford patient number. (213-13-64-6, 33b) Antonio was treated by the Henry Ford Hospital for years after his birth and this Hospital was well aware of Antonio's severe neurological impairment and spastic cerebral palsy. [e.g. 33b, 34b]

On April 12, 1985, requests for medical records which provide some notice of a potential claim were sent by Jeffrey N. Shillman of the law firm of Sommers, Schwartz, Silver and Schwartz, P.C.,who requested copies of Antonio's complete medical records. [340a] Sommers, Schwartz, Silver and Schwartz was a well known plaintiff medical malpractice firm. The firm asked for Antonio's medical records from "birth to the present." M.S.Logan, M.D., Henry Ford pediatrician, carefully dictated a note for Antonio Craig's Henry Ford medical record after she received the lawyer's request for a complete copy of the records on 11-29-84. [31b]

The 1986 Profit Corporation Annual Report document for Associated Physicians, P.C. [342a-343a] was filed on 9-26-86. [342a] Total assets, reflecting the period until 12-31-85, were listed as $419,015.00. [343a]

2. Associated Physicians Medical Centers, Inc.

On 10-15-86, Associated Physicians amended its articles of incorporation and changed from a professional corporation to a business corporation. [369a] It changed its name to Associated Physicians Medical Centers, Inc. [344a] It stated that it converted to a business corporation under Act 284, P.A. of 1972 in order to

"comply with section 7 of the Professional Service Corporation Act, M.C.L. § **450.227.** Although it changed to a business corporation, it did not as a matter of fact and law form a new corporation. A plain reading of the *Amended and Restated Articles,*[1] provides that the document pertains to only one continuous solitary corporation.[2] The corporation number (021-484), address, and phone number all stayed exactly the same. Its purpose was stated to have broadened from the "Practice of Medicine & Surgery" to a purpose which included to "supply physical facilities, supplies, ancillary health personnel and management services to providers of medical care and to perform any lawful activity for profit."[3] [369a-371a]

Mr. Share, who was the corporate attorney then representing Henry Ford, alleged in his affidavit that, inter alia, on or about 10-15-86, Henry Ford Health System consummated the conversion of Associated Physicians to a business corporation, broadening its purpose to include "and to perform any lawful activity for profit," and purchasing all the shares of Associated Physicians, Inc. A tract inquiry, which revealed Mr. Share's name [351a] as the responsible attorney,

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1 In their brief, Henry Ford left out the word "amended."

2 The disconnection between the two names of the same corporation in Henry Ford's Flow Chart is a striking misrepresentation. [454] Associated Physicians P.C. is far up and to the left without any arrow connecting it to Associated Physicians Medical Centers, Inc.

3 Daniel M. Share's affidavit, at paragraph 5e, [357a] omits the reference to "supply ancillary health personnel" but does correctly quote the changed broadened language as to purpose in the amended articles of incorporation. [356a]

indicated that the premises and real estate located at the medical center's address in Taylor were purchased on 12-30-86 by Henry Ford Health Care Corp.

Mr. Share and Henry Ford failed to produce the actual purchase agreement in the lower court. This obvious omission of something that must be is in their exclusive control, is itself probative evidence that in the language of the purchase agreement, Henry Ford accepted the potential liability. Instead of having provided the complete purchase agreement, Henry Ford provided details about a start-up company, APMC, P.C. [373a] which, aside from being a contractor who contracted after the fact, appears to have no corporate merger, acquisition or "continuity" type connection to this matter except to allow defendant-appellant an opportunity to attempt to distract the observer and point the finger elsewhere. Notably missing from Mr. Share's affidavit is any reference to the Henry Ford purchase agreement, specifically the presence or absence, in the purchase agreement, of whether Henry Ford explicitly accepted liabilty for potential actions from the past.

Certainly, the potential for liability is present when purchasing a large clinic practice. The potentiality of this occurrence would have been addressed in the purchase agreement and likely through tail insurance purchase and coverage. The likelihood of liability when purchasing a clinic is foreseeable.

Apparently Henry Ford is arguing that by converting a professional corporation to a business corporation, one can break the chain of responsibility under the law, and thereby nullify one's liability. Further, Henry Ford also attempts to convince the Court that the purchase of the business corporation can be done in a fashion to

sever liability for past acts. Henry Ford cites absolutely no law for this scheme, because there is no such law.

In Turner v Bituminous Casualty Co, 397 Mich 406, 419-420; 244 NW2d 873 (1976), the Supreme Court stated that it was the law in this state "that if two corporations merge, the obligations of each become the obligations of the resulting corporation." See also **M.C.L.A. 450.2721 and 2722** ("the separate existence of corporations parties to the plan of merger...except the surviving corporation, shall cease.") ("The surviving corporation is thenceforth responsible and liable for all liabilities and obligations of each of the corporations merged...") This is true of non-profit as well as for profit corporations.

3. Henry Ford Medical Center: An assume name for Henry Ford Health Systems. Plaintiff's Exhibit J, omitted from the Henry Ford Brief and Appendix, was admitted at trial. [310a, lines 14-17] This was a list of Assumed Names for Henry Ford Health System. Effective 4-21-87, Henry Ford Medical Center - Taylor and Henry Ford Medical Center became Assumed Names for Henry Ford Health System and Henry Ford Medical Center was renewed as an Assumed Name on 12-30-92. [35b,38b,47b]

Effective 12-31-89, Henry Ford Health Care Corporation merged with Henry Ford Hospital and the consolidated entity was renamed upon the effective date of the merger as Henry Ford Health System. [350a] This entity owned Associated Physicians and had an assumed name: Henry Ford Medical Center.

Following the purchase of Associated Physicians by Henry Ford, Associated Physicians utilized the Henry Ford patient numbers. From that point, Antonio Craig

only had one patient number - the same number he had already been using for years at Henry Ford.

A Certificate of Dissolution was filed on behalf of Associated Physicians on May 6, 1993. [349a] The legal name and corporation number was terminated. What remained was the same medical center, intact, under the name Henry Ford Medical Center. Following dissolution, everything that was Associated Physicians Medical Center merged entirely into Henry Ford Medical Center, an assumed name for Henry Ford Health System.

Photographs of Henry Ford Medical Center in Taylor were taken in 1996 and admitted at trial. [353a, 354a] The large sign on the building is "Henry Ford Medical Center." [353a-1] On the bulletin board inside there was a license from the City of Taylor, which read,"This certifies that Henry Ford Medical Center, located at 2455 Haig, is hereby licensed to operate a medical center." [49b] The investigator's affidavit made it clear that APMC, P.C. was not referenced there in any way. [353a] The physicians' cards were labeled "Henry Ford Medical Center," as were the patient records. [27b] As can be seen [27b-30b], Antonio Craig's records in 1993 utilize the patient number 213-13-64-6 at "Henry Ford Medical Center," an assumed name for defendant Henry Ford Health System. ("Tay" stands for Taylor) Antonio's card also reads Henry Ford Medical Centers. [28b-30b] Henry Ford Medical Center - Taylor, was at the same address as Associated Physicians, 24555 Haig, had the same phone number, 295-4200 and was in direct continuity with the original corporation, defendant Associated Physicians.

SUCCESSOR LIABILITY AND TRIAL PROOFS FLOWCHART

7-16-80

Antonio is born
Associated Physicians, Inc. (Dr. Gennaoui's employer)

Corp. State ID: 021-484
Address: 24555 Haig, Taylor
Phone: 295-4200

1986

CHANGES:
Amended Articles of Incorporation
Purchased by Henry Ford, becomes business corp.
Name changes to **Associated Physicians Medical Center, Inc.**

Corp. State ID **REMAINS**: 021-484
Address **REMAINS**: 24555 Haig, Taylor
Phone **REMAINS**: 295-4200
Antonio's Patient ID: 213-13-64-6*

1993

CHANGES:
Certificate of dissolution
Entity merges into Henry Ford Health System, with Assumed name of **Henry Ford Medical Center** on building, license, patient cards, physicians' badges, etc.

Address **REMAINS**: 24555 Haig, Taylor
Phone **REMAINS**: 295-4200
Antonio's Patient ID **REMAINS**: 213-13-64-6*

*This is the Henry Ford Health System ID that Antonio has had since initial Henry Ford contact in his first year of life.

B. The Stipulation Agreement Placed on the Record and Completely Omitted From Henry Ford's Brief and Appendix

Henry Ford filed its own motion to sever in this case. Counsel for Henry Ford discussed an agreement with plaintiff's counsel before the hearing and on the day of the hearing. The hearing was held on January 10, 1997. The transcript to this motion hearing has been completely omitted by Henry Ford from its Brief, Relevant Docket Entries, and Appendix but is included in full by Plaintiff. [1b-15b] It was omitted because counsel for Henry Ford agreed on the record when the Court clarified that Henry Ford was "waiving all rights...you will waive all rights to a jury trial and any factual issues." [7b, lines 11-22]

The Court specifically ruled on the record as follows:

THE COURT:	I will sever the claim and we could do - - as long as you're waiving all rights... So, if you're waiving...So, I will sever the claim if you agree that *you will waive all rights to a jury trial and any factual issues*. [7b, lines 11-22]
MR HENK:	I don't have a problem with that, because I think that *whatever the documents say the documents say*. Whatever corporate contractual documents on their face say what they say. [7b, lines 23-25]

In addition, Plaintiff's counsel placed on the record another portion of the stipulation. This part of the settlement looked to the future as well. Before waiving his own right to a jury trial, Plaintiff made it clear on the record that, by agreement ("agreeing") the parties were also explicitly conditioning the severance on an

agreement that the issue would be overseen only by "this court and this judge" and stated as follows:

> MR SILVERMAN: just for saying what might happen in the future; in other words, I'm agreeing to waiving jury right, your Honor, however, I do want *this court and this judge* to be the one overseeing this legal issue. And I'd also like you to waive any right to ask if she - - I'm just, you know, foreseeing if something occurs out of the ordinary. In other words, this is the court, this is the judge that's going to decide this issue. [8b, lines 17-24]
>
> MR HENK: This is where we'll be. [8b,16-25]

The record could not be clearer as to the severance agreement conditions. Each side waived its right to a jury trial and each side had agreed to have the issue decided on documents submitted only. Given the fact that Henry Ford was the one who drove the bus on this agreement, vehemently negotiated and discussed the issue with plaintiff's counsel beforehand as to limiting the evidence to documentary evidence only, it is not only disingenuous but misleading for Henry Ford's Brief, at page 3, to criticize the lower court's decision based on allegations of inadequate facts, inadequate length of the trial, and the absence of witnesses.

Given the fact that Henry Ford agreed to "waiving all rights" including that it agreed to "waive all rights to a jury trial and any factual issues," [7b, lines 11-22] and given the fact that Henry Ford also agreed to NOT have any other judge "oversee" the successor liability issue, this matter, as a matter of law, as agreed by the parties

on the record, ended when Henry Ford lost the successor liability bench trial in the lower court. But Henry Ford doesn't want this Court to see any, know any, or consider any of this reality on appeal because the agreement on the record controls, which means they can't appeal.

As they did in the Court of Appeals, Henry Ford's Brief, although referencing the entire opinion of the Court of Appeals [425a-452a], fails to mention the aforementioned set of facts, including the conditions of the Agreement placed on the record on January 10, 1997. In fact, according to a reading of Henry Ford's Brief and Appendix, the January 10, 1997 hearing and agreement placed on the record never took place. Although the Court of Appeals ruled, as a matter of law, that by choosing not to participate in the jury trial of the malpractice claims Henry Ford had waived review of any issues associated with the jury trial, citing People v Carter, 462 Mich 206, 214-216; 612 N.W.2d 144 (2000), it appears that the Court of Appeals, who received a "shot gun" style appeal from Henry Ford, overlooked this early pre-trial transcript and the plain language of the agreement which was placed on the record. [427a, footnote 2, page 3]

In addition to the issue of "finding Henry Ford Hospital liable on a successor liability theory," the granting Order from this Court, in paragraph one (1), addressed issues in the malpractice portion of the lower court action including "whether the testimony was based on facts not in evidence" and "whether the trial court erred in permitting the testimony of plaintiff's expert's witnesses." As to these issues, Plaintiff-Appellee hereby incorporates by reference all aspects of the Plaintiff-

Appellant's Brief and Appendix filed on December 9, 2003 in Supreme Court No. 121405 as to Oakwood Hospital in this appeal. Although Plaintiff-Appellee has yet to receive a brief from Defendant-Appellant Associated Physicians P.C. in this appeal, Plaintiff-Appellee incorporates by reference all aspects of his Brief and Appendix that he anticipates filing as to Associates Physicians P.C., the predecessor to Associates Physicians Medical Center, which was known at the time of trial as Henry Ford Medical Center, an Assumed Name for Henry Ford Health System. This Brief will focus on the one issue identified in this Court's September 12, 2003 granting Order that, arguendo, survived the explicit waiver placed on the record by Henry Ford in the lower court, cited supra, and applies to only Defendant-Appellant Henry Ford:

> Whether the trial court erred in finding defendant Henry Ford Hospital liable on a successor theory...In all other respects, the application for leave to appeal is DENIED.

C. Successor Liability Facts and Trial

The findings of facts and law made by the lower court were expressed formally by the lower court in its 5 page September 12, 1997 Opinion and Order Regarding the Liability of Henry Ford Health Systems (417a-421a) The court stated at page 2 that "most of the facts are undisputed." On page 3, the court identified Turner v Bituminous Casualty Co, 397 Mich 406 (1976) as "the principal case on successor liability." At page 3 and 4 the court quoted entirely the four (4) "relevant principles" identified by the Supreme Court in Turner. At page 4 of the Opinion and Order, the lower court reviewed all four conditions and stated that: "Applying the

undisputed facts of [the] case to the above principles, the court finds each condition has been met."

This medical malpractice case was brought by minor Antonio Craig against defendant Doctor Gennaoui who was indisputably employed at the time of the alleged occurrence by defendant Associated Physicians, P.C.. A bench trial, which was governed by the aforementioned stipulation placed on the record on January 10, 1997, was held after plaintiff prevailed at jury, to determine the issue of successor liability. On the record of the hearing of January 10, 1997, Henry Ford had agreed to "waiving all rights" including that it agreed to "waive all rights to a jury trial and any factual issues," [7b, lines 11-22] and it agreed that the bench trial would be decided on the documentary evidence only, [7b, lines 23-25, 8b, lines1 and Henry Ford also agreed to NOT having any other judge or any other court "oversee" the successor liability issue. [8b, lines 19-24]

The findings of facts and law were expressed formally by the court in its September 12, 1997 Opinion and Order Regarding the Liability of Henry Ford Health Systems, which Appellee hereby incorporates by reference herein. [417a-421a]

Associated Physicians, P.C. was incorporated on or about January 25, 1966. The address of Associated Physicians, P.C. was at all times pertinent to this action: 24555 Haig, Taylor, Michigan 48180. Associated Physicians, P.C.'s corporation identification number was 021-484. [342]

Through an amendment of the articles of incorporation [344a] filed October 15, 1986, this corporation changed its name by adding "medical center" and

dropping "P.C.", and changed and broadened its purpose to "any lawful activity for profit" and became a business corporation. [344a] At the top of this document there is typed "AMENDED AND" in front of the title of the document. Further, Article I of the document indicates that it was "as amended, as follows:" and then provides the amended (changed) name and purpose. This corporation retained the same corporation identification number of 021-484.

The Flow Chart on page 6 of Appellant's Brief and on the last page of Appellant's Appendix [453a] is completely false and misleading in that it omits any direct connection between Associated Physicians, P.C. and Associated Physicians Medical Center, Inc. The first converted into the second through amended articles of incorporation. There was no intervening entity known as APMC, PC. Appellant's flow chart is a devise intended to fool, not to meaningfully reflect the facts. At Associated Physicians Medical Center, Inc. Antonio used the same patient number he had been using for years in the Henry Ford system.

Associated Physicians, the P.C. and later the Inc., was the same continuous company, as proven at the bench trial, under Turner v Bituminous Casualty Co., 397 Mich 406, 244 NW2d 873 (1976).

At no time has Henry Ford come forward to produce the written Purchase agreement between itself and Associate Physicians, P.C. or any other entity. Instead, at bench trial, it merely produced two affidavits without actually producing the sales agreement. This unexplained omission gives rise to a reasonable inference of contractually based merger and is substantive evidence of merger.

Why else would Henry Ford choose to not produce this all-important document at bench trial other than to conceal the fact that the purchase agreement expressly stated it was taking on liability for accrued claims?

Henry Ford Health Care Co., as of 1986, owned the premises located at 24555 Haig, Taylor, Michigan.

III. ARGUMENT

A WHEN DEFENDANT HENRY FORD ON ITS OWN MOTION ENTERED INTO AN AGREEMENT WITH THE PLAINTIFF WHICH WAS PLACED ON THE RECORD AT THE JANUARY 10, 1997 HEARING, AND WHEN IN EXCHANGE FOR THE PLAINTIFF WAIVING HIS RIGHT TO A JURY TRIAL ON THE SUCCESSOR LIABILITY ISSUES OF FACT DEFENDANT AGREED TO "WAIVING ALL RIGHTS" INCLUDING WAIVING "ALL RIGHTS TO A JURY TRIAL AND ANY FACTUAL ISSUES," [7b, 11-22] AND AGREED THAT THE BENCH TRIAL WOULD BE LMITED TO THE COURT DECIDING ON THE DOCUMENTARY EVIDENCE ONLY, [7b, 23-25, 8b] AND ALSO AGREED TO NOT HAVING ANY OTHER JUDGE OR ANY OTHER COURT "OVERSEE" THE SUCCESSOR LIABILITY ISSUE [8b] HENRY FORD WAIVED ITS RIGHT TO APPELLATE REVIEW OF ANY SUCCESSOR LIABILITY ISSUE.

STANDARDS OF REVIEW:

The clearly erroneous standard of review applies to findings of fact and rulings arrived at therefrom rendered in a bench trial. See, for example, Precopio v City of Detroit, 415 Mich 457, 465-467; 330 NW2d 802 (1982) An error in anything done or omitted by the trial court is not ground for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice. MCR 2.613(A) ("Harmless Error" standard)

The issue as to whether or not continuity existed, and whether the continuity

criteria found in Turner v Bituminous Casualty Company 397 Mich 406 (1976) were met, in this case after a name change or re-structuring, was an issue of fact and a specific finding made by the finder of fact, and is to be reviewed under the clearly erroneous standard of review. MCR 2.613(C); See, also, Uchwat v U-haul Rent-A-Truck 28 Mich. App. 427, 430; 184 N.W.2d 566-7, (1970) ("The trial court found that 'there had been a ***continuity*** of process...' This Court is of the opinion that the above facts established sufficient compliance ... to support the trial court's finding.'")

ARGUMENT:

Henry Ford filed its own motion to sever in this case. Counsel for Henry Ford discussed an agreement with plaintiff's counsel before the hearing, and on the day of the hearing. The hearing was held on January 10, 1997. The transcript to this motion hearing has been completely omitted by Henry Ford from its Brief, Relevant Docket Entries, and Appendix but is included in full by Plaintiff. [1b-15b]

The Court specifically ruled on the record as follows:

THE COURT: I will sever the claim and we could do - - as long as you're waiving all rights... So, if you're waiving...So, I will sever the claim if you agree that *you will waive all rights to a jury trial and any factual issues*. [7b, lines 11-22]

MR HENK: I don't have a problem with that, because I think that *whatever the documents say the documents*

say. Whatever corporate contractual documents on their face say what they say. [7b, line 23] [7b]

Since the assessment of continuity is a factual issue, Henry Ford has waived this issue. Since, this is a case wherein Henry Ford purchased all the assets to the defendant Corporation Associated Physicians, Inc., the successor liability issue is governed entirely by continuity principles. Again, this issue has been waived by Henry Ford, on the record in the lower court and, therefore, pursuant to the stipulation placed on the record in the lower court, Henry Ford's appeal must be denied.

In addition, Plaintiff's counsel placed on the record another portion of the stipulation . This part of the settlement looked to the future as well. Before waiving his own right to a jury trial, Plaintiff made it clear that, by agreement ("agreeing") the parties were also explicitly conditioning the severance on an agreement that the issue would be overseen only by "this court and this judge" on the record and stated as follows:

MR SILVERMAN: just for saying what might happen in the future; in other words, I'm agreeing to waiving jury right, you Honor, however, I do want *this court and this judge* to be the one overseeing this legal issue. And I'd also like you to waive any right to ask if she - - I'm just, you know, foreseeing if something occurs out of the ordinary. I other words, this is the court, this is the judge that's going to decide this issue. [8b, lines 17-24]

MR HENK: This is where we'll be. [8b,16-25]

The record could not be clearer as to the severance agreement conditions. Each side waived its right to a jury trial and each side had agreed to have the issue decided on documents submitted only. Given the fact that Henry Ford was the one who drove the bus on this agreement, vehemently negotiated and discussed the issue with plaintiff's counsel before hand as to limiting the evidence to documentary evidence only, it is not only disingenuous, but misleading for Henry Ford's Brief, at page 3, to criticize the lower court's decision based on allegations of inadequate facts, inadequate length of the trial, and the absence of witnesses.

Given the fact that Henry Ford agreed to "waiving all rights" including that it agreed to "waive all rights to a jury trial and any factual issues," [7b, lines 12-14] and given the fact that Henry Ford also agreed to NOT having any other judge "oversee" the successor liability issue, [8b, lines 23-25] this matter, as a matter of law, as agreed by the parties on the record ended when Henry Ford lost the successor liability bench trial in the lower court. But Henry Ford doesn't want this Court to see any, know any, or consider any of this reality on appeal because, otherwise, they couldn't appeal.

As they did in the Court of Appeals, Henry Ford's Brief, although referencing the entire opinion of the Court of Appeals [425a-452a], fails to mention the aforementioned set of facts including the conditions of the Agreement placed on the record on January 10, 1997. In fact, according to a reading of Henry Ford's Brief and Appendix, the January 10, 1997 hearing and agreement placed on the

record never took place. Although the Court of Appeals ruled, as a matter of law, that by choosing not to participate in the jury trial of the malpractice claims, Henry Ford had waived review of any issues associated with the jury trial, citing People v Carter, 462 Mich 206, 214-216; 612 N.W.2d 144 (2000), it appears that the Court of Appeals, who received a "shot gun" style appeal from Henry Ford, overlooked this early pre-trial transcript and the plain language of the agreement which was placed on the record. [427a, footnote 2, page 3]

B **When Henry Ford brought a motion to sever, and agreed on the record not to re-litigate, and by not participating in any way in the jury trial, Henry Ford has waived any further litigation of these issues, and is precluded on appeal from raising any issues relating to the jury trial and verdict in connection with the malpractice claims. Cf. People v Carter, 462 Mich 206, 214-216; 612 N.W.2d 144 (2000)**

STANDARDS OF REVIEW:

See those listed after Argument A, supra.

ARGUMENT:

Henry Ford, on the record, agreed that "if the court did sever our portion for whatever determination, that we would not re-litigate the malpractice issue." [5b, lines 23-25) The Court of Appeals ruled, that by choosing not to participate in the jury trial of the malpractice claims, Henry Ford had waived review of any issues associated with the jury trial, citing People v Carter, 462 Mich 206, 214-216; 612 N.W.2d 144 (2000).

C. **HENRY FORD HEALTH SYSTEM IS LIABLE TO PLAINTIFF AS THE SUCCESSOR TO DEFENDANT ASSOCIATED PHYSICIANS, P.C. AND ASSOCIATED**

PHYSICIANS MEDICAL CENTERS, INC. AND THERE WAS NO CLEAR ERROR FOR THE TRIAL COURT TO HAVE FOUND HENRY FORD HEALTH CARE CO. IN CONTINUITY WITH THEM UNDER TURNER V BITUMINOUS CASUALTY COMPANY 397 MICH 406 (1976).

STANDARDS OF REVIEW:

The continuity of the enterprise and dissolution of the subsidiary ("sub") are the primary "guidelines" as to whether successor liability doctrine applied, and the discretionary nature of balancing and factual inquiry to this application was once again endorsed in Haney v Bendix Corp., 88 Mich App 747; 279 NW2d 544 (1979). In Haney, at page 751, the Court of Appeals noted as follows:

> We do not interpret Turner as standing for the proposition that plaintiff establish a de facto merger before successor liability attaches. Rather the stated requirements are **only guidelines.** The availability of the transferor corporation is simply a factor in determining continuity. It is not an independent prerequisite to the imposition of liability. **Continuity and dissolution *may* be the prerequisites when a de facto merger is involved.** When a sale of assets for cash is involved, continuity alone is the test. [emphasis added]

The clearly erroneous standard of review applies to findings of fact and rulings arrived at therefrom rendered in a bench trial. See, for example, Precopio v City of Detroit, 415 Mich 457, 465-467; 330 NW2d 802 (1982) The issue as to whether or not continuity existed, and whether the continuity criteria found in Turner v Bituminous Casualty Company 397 Mich 406 (1976); were met, in this case after a name change or re-structuring, was an issue of fact and a specific finding made by the finder of fact, and is to be reviewed under the clearly erroneous standard of

review. MCR 2.613(C); See, also, Uchwat v U-haul Rent-A-Truck 28 Mich. App. 427, 430; 184 N.W.2d 566-7, (1970) ("The trial court found that 'there had been a *continuity* of process...' This Court is of the opinion that the above facts established sufficient compliance ... to support the trial court's finding.'") An error in anything done or omitted by the trial court is not ground for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice. MCR 2.613(A) ("Harmless Error" standard)

In Charter Township of Delta v. Dinolfo, 419 Mich. 253; 351 N.W.2d 831; (1984), the Michigan Supreme Court reminded us that: "'This Court, however, is inclined to give considerable weight to the findings of the trial judge in equity cases.'" 391 Mich 139, 163, quoting Christine Building Co v City of Troy, 367 Mich 508, 518; 116 NW2d 816 (1962)." Kirk v Tyrone Twp, 398 Mich 429, 439-440; 247 NW2d 848 (1976).

ARGUMENT:

The successor liability in this case arises out of the 1986 to1993 transaction between a moderate sized out-patient medical center clinic in Taylor, Michigan and a relatively huge health care corporate entity called Henry Ford Health System. To fully understand and analyze the important policy considerations, potential implications and far reaching effects of this case, this Court is encouraged to acquaint itself with the history of how hospitals have attempted, legally and illegally, sometimes with a carrot and sometimes with a stick, to establish, influence and control referrals from physicians.

One type of merger and acquisition by a hospital is illustrated in the case herein. Why did Henry Ford cause Associated Physicians, P.C. to convert to Associated Physicians, Inc., then proceed to purchase all of its stock, only to completely dissolve the wholly owned subsidiary entity in 1993, and continue to operate under an assumed name of Henry Ford Medical Center?

Through the completed acquisition and merger comes complete control of the patient records, and all of the referrals that may arise therefrom. The exact structure and terms of the 1986 purchase is not available to us since Henry Ford has consistently withheld the purchase agreement ("P.A.") in this matter. We are told to believe that there was no P.A. It is reasonable to infer that the P.A. would reveal either voluntary assumption or indemnification of pre-existing liabilities. Just as likely, the P.A. would reveal further aspects to the transaction which cross over legal barriers to pursuing referrals.

For example, the Anti-kickback Statute (the "AKS"), 42 U.S.C. 1320a7b, is a criminal statute which makes it a felony for: "whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person - (A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under sub-chapter XVIII of this chapter or a State health care program, or (B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part

under sub-chapter XVIII of this chapter or a State health care program . . . . " United States ex rel. Perales, M.D. v. St. Margaret's Hosp., 243 F. Supp. 2d 843, at 849 (U.S. Dist, 2003.) 42 U.S.C. 1320a7b(b)(2). Hence, the AKS focuses on the circumstances surrounding the referrals themselves. "It is necessary to consider the amounts paid for the practice or as compensation to determine whether they reasonably reflect the fair market value of the practice or the services rendered, in order to determine whether such items in reality constitute remuneration for referrals." Perales, at 849.

Another very relevant statute is the Stark Act. The Stark Act is designed to prevent abusive self-referrals. Under the Stark Act, a physician is prohibited from making any referral to a provider of designated health services, like Henry Ford Health System, if the physician has a "financial relationship" with the provider, unless an exception applies. 42 U.S.C. 1395nn(a). Financial relationship is further defined as a compensation arrangement between the physician and the provider, and a compensation arrangement is defined as "any arrangement involving any remuneration between a physician (or immediate family member of such physician) and an entity other than an arrangement involving only remuneration described in subparagraph (C)." 42 U.S.C. 1395nn(a)(2) and (h)(1)(A). Obviously, the transaction described herein implicates the Stark Act and should, at a minimum, trigger an inquiry.

Under the Stark Act , a healthcare provider is prohibited from submitting claims to government payors for services rendered to patients referred in violation of

the statute, and government payors are prohibited from paying such claims. 42 U.S.C. 1395(g)(1). The Anti-Kickback Act does not absolutely prohibit hospitals from acquiring medical practices, nor does it absolutely preclude the seller-doctor from making future referrals to the buyer-hospital, provided there are no economic inducements for those referrals. To comply with the statute, the hospital must simply pay fair market value for the practice's assets. U.S. ex rel. Obert-Hong v Advocate Health Care, 211 F. Supp.2d 1045, 1049 (N.D.Ill. 2002). Similarly, a hospital's purchase of a medical practice could implicate Stark's prohibition on financial relationship between referring physicians and hospitals benefitting from such referrals. Perales, at 851.

The Anti-Kickback Act does not prohibit hospitals from acquiring medical practices, nor does it preclude the seller-doctor from making future referrals to the buyer-hospital, provided there are no economic inducements for those referrals. To comply with the statute, the hospital must simply pay fair market value for the practice's assets. U.S. ex rel. Obert-Hong v Advocate Health Care, 211 F. Supp.2d 1045, 1049 (N.D.Ill. 2002). Similarly, a hospital's purchase of a medical practice could implicate Stark's prohibition on financial relationship between referring physicians and hospitals benefitting from such referrals.

Henry Ford was no doubt keenly aware of some of laws which precluded the purchase of referrals from an entity such as Associated Physicians.

Under M.C.L.A. 450.1724 Sec. 724. (1), "When a merger takes effect" every other corporation party to the merger merges into the surviving corporation and,

under (d): "The surviving corporation has all liabilities of each corporation party to the merger." See also D F Broderick, Inc. v Continental Credit Corp, 309 Mich 546, 550; (1944). this applies fully to "de facto" mergers as well. Turner v Bituminous Casualty Company 397 Mich 406 (1976); Shannon v Samuel Langsten Co., 379 F. Supp 797 (W.D. Mich 1974). See also M.C.L.A. 450.2721 and 2722 ("the separate existence of corporations parties to the plan of merger...except the surviving corporation, shall cease.") (The surviving corporation is thenceforth responsible and liable for all liabilities and obligations of each of the corporations merged...")

The Henry Ford Brief misses this important aspect of merger law - the surviving merged entity has all the liabilities and obligations of each of the constituent corporations to the merger, as if they were the constituent corporation. The survivor stands in the shoes of each of the merging entities. The legislature doesn't want a merger or acquisition to result in a corporation skirting liability or an injured party going uncompensated.

An important policy behind both non-profit and for-profit merger law is the strong policy against corporations utilizing mergers and acquisitions to escape liability. Although cited by Henry Ford in their Brief, Henry Ford seems to miss the important policy considerations behind why MCL 450.230 and 450.233 make a professional corporation unable to be owned or purchased by non-members of the profession. MCL @ 450.233 ; MSA 21.315(13) does indeed state that "A professional corporation organized under this act shall not consolidate or merge with another corporation whose shareholders are not licensed persons permitted to

be shareholders under this act." By admitting that it sought to avoid this bar contained within this statute, Henry Ford is admitting that the transaction was to "consolidate or merge." The law is clear with respect to the survival of liability in the successor corporation.

The law reflects a legislative interest in making it more difficult for non professional purchasers or institutions, like Henry Ford, to acquire professional services corporations. This potentially allows for greater professional autonomy, and therefore quality, amongst the professional population in our State. The Professional Service Corporation Act, MCL 450.221 *et seq.*; MSA 21.315(1) *et seq.*, section 6 of the act provides:

> "Nothing contained in this act shall be interpreted to abolish, repeal, modify, restrict or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service and to the standards for professional conduct. Any officer, shareholder, agent or employee of a corporation organized under this act shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional service on behalf of the corporation to the person for whom such professional services were being rendered. The corporation shall be liable up to the full value of its property for any negligent or wrongful acts or misconduct committed by any of its officers, shareholders, agents or employees while they are engaged on behalf of the corporation in the rendering of professional services." [MCL 450.226; MSA 21.315(6)]

Continuing liability despite changing from a professional service corporation

to a business corporation was addressed in Burrows v Bidigare Bublys, Inc., 158 Mich. App. 175 ; 404 N.W.2d 650, 1987). Two physicians filed a lawsuit against an architectural firm whose corporation had originally been incorporated under the Business Corporation Act, MCL 450.1101 et seq.; MSA 21.200(101) et seq., and not the Professional Service Corporation Act. Citing public policy, in Burrows at 183, the Court explained that it doesn't matter if a defendant changes from a professional services corporation to a business corporation, the defendant would still be personally liable because "it would be against public policy" to permit such a professional to insulate himself from liability for his personal failure to conform to professional standards, merely because he performs the services as an agent of a [business] corporation. Thus, the principles set forth in the Professional Service Corporation Act would apply regardless of whether the defendant corporation came to life under that statute. Accordingly, the same public policy should lead the Court to not insulate individuals merely because they changed from a professional service corporation converts to a business corporation.

Associated Physicians, P.C. could have dissolved and a new corporation could have been formed. This is NOT what happened. Henry Ford, likely by and through its lawyers, like Mr. Share, the author of the affidavit repeatedly cited and relied upon in Henry Ford's Brief, had Associated Physicians, P.C. amend its Articles of Incorporation and change its name to Associated Physicians Medical Center, Inc. The plan also included making Henry Ford Medical Center - Taylor, an Assumed Name of Henry Ford as well.

The most important asset, from the hospital's standpoint, are the consumers, and payors of healthcare services, the paying customers: i.e. the patients. By buying a large group practice, Henry Ford seized not only control, but ownership of the patient records, formerly owned by Associated Physicians, P.C. Long term good will and a broader patient base were built this way.

The assumed name and the entity known as Henry Ford Medical Center is not a "new" place, and it's not a new corporation. From the patients' viewpoint, the sign on the building may have slightly changed, and the physicians like Dr. Gennaoui may come and go, but in every other way it's essentially the same medical center (Associated Physicians Medical Center) that it was when Antonio Craig was born, except that it has become Henry Ford Medical Center, since it was purchased and dissolved by Henry Ford Health Systems. This is the essence of continuity following a sale of the stock purchase by one corporation, of another corporation.

A corporation is a statutory creation. There are formal mechanisms to create corporate life and there are formal mechanisms for ending corporate life (acquisition/dissolution/merger). Amending articles of incorporation to change the name or type of incorporation, in this case, did in no way end the medical center enterprise that was Associated Physicians, P.C. which was also known as Associated Physicians Medical Center and converted to a business corporation by this name. This is a factual question that was definitively decided in the lower court. Furthermore, Henry Ford explicitly on the record waived any factual issues. [7b, lines

21-22]

When Henry Ford purchased Associated Physicians, Inc., this in no way ended the medical center enterprise that was Associated Physicians, Inc. Again, this is a fact question that was definitely decided in the lower court. Further, Henry Ford on the record explicitly waived any factual issues.

The defendant has cited nothing to support the conclusion that by converting from one type of corporation to another type of corporation somehow continuity was severed, as a matter of law. Direct continuity in this case is open and obvious. The conversion occurred and the business corporation was stated to have the unlimited purpose of "any lawful activity for profit." Then Henry Ford purchased all the stock in this business corporation, soon thereafter, until dissolving the entity in 1993 and allowing it to continue as its assumed name Henry Ford Medical Center. Under these facts, direct continuity exists and prevails in plaintiff's favor as it did in the lower court and Court of Appeals.

Again, the parent Henry Ford dissolved the sub Medical Center in 1993, and the exact entity continued on under the assumed name of Henry Ford Medical Center. So after the dissolution, there is no sub, and there is no parent-sub veil to pierce. When the sub, Associated Physicians, Inc., is finally dissolved in 1993, all that was left was one solitary corporation which contains the old corporation incorporated into a larger solitary merged entity - Henry Ford Health Systems. Hence, Henry Ford Health Systems, a/k/a Henry Ford Medical Center, was and is the merged entity containing as a constituent Associated Physicians Medical Center,

Inc.

Henry Ford fails to make much, if any, of a discernable argument for why, in its view, amending the articles of incorporation in a way that changes a Professional Corporation into a Medical Center, somehow inexplicably breaks continuity. From a business standpoint, or a valuation standpoint, the key asset of any medical practice is typically not the physician, but the patient records, goodwill, and the demand for future services. Those, like Henry Ford and Associated Physicians, who engage in the business of purchasing, selling and valuing medical practices, know that it's the patient's records, the flow of patients, the location, and the referral of more patients for expensive in-patient or out-patient procedures, that drives the value of a practice.

Antonio Craig is a perfect example of how the Henry Ford marketing-corporate acquisition strategy works quite well. After purchasing Associated Physicians, the merger unification process depicted in Plaintiff's Flow Chart [ ] eliminated the separate legal existence of his primary care site in Taylor, and instead, made this primary out-patient clinic site Henry Ford Medical Center which is part of Henry Ford. This type of capture ensured that all of his care, particularly the more expensive and money making portions of his care, like invasive and non-invasive testing, was provided exclusively at Henry Ford for years . His record, admitted as Exhbit J, at bench trial, was over 400 pages long!

Since this was a cash total stock purchase by Henry Ford of Associated Physicians, "continuity alone is the test." Haney v Bendix Corp., 88 Mich App 747;

279 NW2d 544 (1979). In Haney, at page 751, the Court of Appeals noted as follows:

> We do not interpret Turner as standing for the proposition that plaintiff establish a de facto merger before successor liability attaches. Rather the stated requirements are only guidelines. The availability of the transferor corporation is simply a factor in determining continuity. It is not an independent prerequisite to the imposition of liability. Continuity and dissolution *may* be the prerequisites when a de facto merger is involved. **When a sale of assets for cash is involved, continuity alone is the test.** [emphasis added]

There is no doubt that Henry Ford Medical Center is in direct continuity line from Associated Physicians, P.C. See, for example, Precopio v City of Detroit, 415 Mich 457, 465-467; 330 NW2d 802 (1982) The issue as to whether or not continuity existed, and whether the continuity criteria found in Turner v Bituminous Casualty Company 397 Mich 406 (1976); were met, in this case after a name change or re-structuring, was an issue of fact and a specific finding made by the finder of fact, and is to be reviewed under the clearly erroneous standard of review. MCR 2.613(C); See, also, Uchwat v U-haul Rent-A-Truck 28 Mich. App. 427, 430; 184 N.W.2d 566-7, (1970) ("The trial court found that 'there had been a ***continuity*** of process...")

In the case herein, Henry Ford Hospital never produced, and still hasn't produced, the underlying purchase agreement between itself as parent and Associated Physicians Medical Center, Inc. A reasonable inference of contractual merger liability may be arrived at from this material omission alone. SJI2d 3.10 Evidence consists of not only what is produced, but reasonable inferences may be

formed from what is materially omitted. Why else would Henry Ford choose to NOT produce at trial this all-important sales agreement?[4]

Through an amendment of the articles of incorporation filed October 15, 1986, this corporation merely changed its name to ASSOCIATED PHYSICIANS MEDICAL CENTERS, INC. ("SUB") and broadened its purpose to "supply physical facilities, supplies, ancillary health personnel and management services to providers of medical care **and to perform any lawful activity for profit.** [ ] The lower court found, and the evidence submitted at the bench trial showed, that this newly named corporation retained and continued as the same corporation with the same corporation identification number - 021-484 and after dissolution in 1993, operating as Henry Ford Medical Center, Taylor which is an assumed name of Henry Ford Health Care Systems. (Exhibit 2, September 12, 1997 Opinion and Order) (T - 27, page 21, lines 14-17)

APMC, P.C. is one of likely many new companies started in 1986. It has nothing to do with this action or this case. It is a red herring utilized as a ruse by Appellant Henry Ford. The lower court was not fooled at all and made a specific finding in her September 12, 1997 Opinion and Order that Associated Physicians, P.C. and Associated Medical Center, Inc. were in "continuity" under Turner v Bituminous Casualty Co., 397 Mich 406, 244 NW2d 873 (1976). (Exhibit 2)

De facto mergers arise when there is, as in the case herein, a sale and

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[4] Plaintiff asked for this prior to the bench trial, but after discovery lapsed and Henry Ford refused to produce it.

consequent dissolution of a corporate enterprise. This gives rise to a broad successor liability doctrine for all tort claims incurred by its predecessor following a de facto merger so long as the transferor corporation becomes defunct. See also, for example Western Resources Life Insurance company et al. v Alton R. Gerhardt et al 553 S.W.2d 783 (Tex. 1977) citing Investors Preferred Life Insurance Co. v. Abraham, 375 F. 2d 291 (10th Cir. 1967) and Thomas v E.J. Korvette, Inc. 329 F.Supp 1163 (E.D. Pa 1971), rev'd on other grounds, 476 F.2d 471 (3rd Cir. 1973). The *Western* court, supra, stated on page 787: "The successor corporation assumes all responsibility for all of the outstanding tort claims of the merging corporations, including exemplary damages."

The facts of the Turner case, supra, are nearly identical to the case presented here. In Turner, a company called Sheridan ("old Sheridan"), defendant manufacturer, was purchased by a company called "Harris." Old Sheridan then changed its name to Nadirehs and subsequently dissolved. The Michigan Supreme Court found that parent corporation Harris was indeed liable. This determination turned upon finding a "basic continuity of the enterprise of the seller corporation." Turner, supra, at 430

As in Turner, the facts stated herein easily establish more than a prima facie case for continuation of the Associated Physicians, P.C. enterprise and therefore a finding of corporate responsibility by Henry Ford Health System. All patients, equipment, buildings, patient records, documents, and goodwill of Associated Physicians, P.C. were absorbed by Henry Ford with the dissolution. There was no

break in continuity at all. The Turner court stated that:

> ...the first, third and fourth criteria quoted in *Shannon* from McKee as tests of continuity of interest, and therefore responsibility, are all relevant, with the first as perhaps of greatest significance, Turner v Bituminous Casualty Co. 397 Mich 406 at 429 (1976).

This was true "regardless what the parties called it, the transaction is deemed to be a de facto merger." The first criterion from *Shannon* was that there have been a "continuation of the enterprise of the seller corporation." The third *Shannon* criterion was that "the seller corporation ceases its ordinary business operations, liquidates, and dissolves." The fourth criterion was stated to have been that the purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation."

The lower court made a specific finding of fact, grounded in the exhibits and affidavit produced at bench trial, that Associated Physicians, P.C. and Associated Physicians Medical Centers, Inc. were each in direct continuity with Henry Ford Health Care Co. (which in 1989 became Henry Ford Health Care Systems) sufficient to impose constructive merger after the dissolution of associated physicians medical centers, inc. in 1993. There can be really no doubt that the uncontested facts in this case support all three of the Shannon criteria and that the lower court did not commit clear error in finding that there was no break in the basic continuity of the enterprise or operations after purchase by Henry Ford and dissolution of the

underlying sub in 1993. Certainly, there was no clear error in the court's findings of fact. Therefore, under the facts in this case, the Plaintiff has proven a prima facie case of de facto merger liability by defendant Henry Ford Health System and the lower court's ruling must stand.

Although it is not a prerequisite to imposing successor liability, notice was provided to the defendant which was discoverable by Henry Ford prior to the purchase in 1986. Appellant Henry Ford's Brief admits notice in the form of letters requesting the complete records which were sent by plaintiff attorneys on behalf of plaintiff in both 1983 and 1985 and this was presented to the lower court. (Page 24, Appellant Henry Ford's Brief On Appeal)

Contrary to appellant's Brief, outside of statutory employment discrimination claims there is no threshold notice requirement which is necessitated prior to imposing defacto merger liability on the successor corporation. Stevens v McLouth Steel Corp, 433 Mich 365, at 371, 446 NW2d 95 (1989) In Stevens, at 365, employment discrimination claims were described as "unique concerns arising out of a successor corporation's liability for alleged employment discrimination." The Stevens decision and opinion, at page 365, specifically confined its holding to notice to the successor of discrimination claims under the Michigan Civil Rights Act. The plain language of the Stevens "conclusion" and holding confines itself to only Michigan Civil Rights Act Claims:

> We conclude that successor liability in a cause of action brought pursuant to the Michigan Civil Rights Act is

> foreclosed where...the successor corporation had no notice of the discrimination claim prior to the acquisition date. Stevens, at 379.

There are unique notice requirements and administrative procedures involved in Civil Rights Act claims which are not features of common law torts including malpractice claims against corporations. Corporations are considered persons for purposes of civil claims. Even within the context of a Michigan Civil Rights Act claim, it was pointed out by the Michigan Supreme Court in Stevens at 376, as follows:

> ...This does not mean, of course, that the plaintiff has the burden of providing notice to the successor. Normally, the burden would be on the successor to find out from the predecessor all outstanding potential and actual liabilities... Musikiwamba, supra, pp 750, 752

Medical negligence is an old common law tort. There is over a century old precedent in Michigan for applying successor liability doctrine in common law tort actions other than products liability. In Wiseman v United Dairies, 324 Mich 473, 505; 37 NW2d 174 (1949), the court reaffirmed and quoted from the language of Chase v Michigan Telephone Co., 121 Mich 631, at 634; 80 NW 717, 718 (1899):

> The law is well settled in regard to liability of the consolidated or purchasing corporation for the debts and liabilities of the consolidating or selling corporations. Such obligations are assumed when (1) two or more corporations consolidate and form a new corporation, making no provision for the payment of the obligations of

> the old; (2) when, by agreement, express or implied, a purchasing corporation promises to pay the debts of the selling corporation; **(3) when the new corporation is a mere continuance of the old;** (4) when the sale is fraudulent, and the property of the old corporation, liable for its debts, can be followed into the hands of the purchaser. Austin v [Tecumseh Nat.] Bank 49 Neb. 412, 68 NW 628. Plaintiff produced no evidence tending to bring the defendant within any of these cases. [Emphasis added]

Thus, the third type of "case," quoted supra in Chase in 1899, makes it clear that far before there was any such thing as products liability, it was established law that, when the new corporation is a mere continuation of the old, successor liability attached.

In Stevens, supra at 371, the Michigan Supreme Court made it clear that the "doctrine of successor liability" applies to "common law tort actions" as well as products liability actions. The Stevens court cited common law tort actions Chase v Michigan Telephone Co., 121 Mich 631, 80 NW 717 (1899) and Denolf v Frank L. Jursik Co., 54 Mich App 584, 589; 221 NW2d 458 (1974), modified on other grounds, 395 Mich 661, 238 NW2d 1 (1976), and a products liability suit, Turner v Bituminous Casuality Co., 397 Mich 406, 244 NW2d 873 (1976).

There is precedent for applying successor liability doctrine and implied assumption of liability in a hospital liability case with a hospital successor. Rogers v Lincoln Hospital et al, 239 Mich 329, 214 NW 88 (1927) (implied successor liability theory was denied on other grounds, not because the defendant was a hospital).

Contrary to what is asserted in appellant's Brief, this is not a veil piercing case, but an acquisition of a sub, followed by a sub-dissolution with the entire merged entity continuing on as the purchaser. Even if veil piercing were involved, and it is not, in other areas of law, "reverse veil piercing" of a parent based on a trial court's balancing of economic realities is commonplace. See for example, Wells v Firestone Tire & Rubber Co, 421 Mich. 641, 650-651; 364 N.W.2d 670 (1984). Reverse piercing occurs when the doctrine is invoked for the benefit of a shareholder. Id. at 651. See also Verhaar v Consumers Power Co, 179 Mich. App. 506; 446 N.W.2d 299 (1989), and Nardi v American Motors Corp, 156 Mich. App. 275; 401 N.W.2d 348 (1986).

There is precedent for applying successor liability in the context of many years having separated the time of dissolution of the subsidiary from the time of injury. In Powers v Baker-Perkins, Inc., 92 Mich App 645, 285 NW2d 402 (1979), for example, successor liability was imposed on a corporation which operated the sub for 28 years, and when the sub had dissolved 16 years before the injury.

It is uncontested that Associated Physicians, P.C. changed its name in 1986 to Associated Physicians Medical Centers, Inc., which Henry Ford acquired as a sub and then later dissolved in 1993, only one year before the Complaint was filed in this case, leaving the entity as an assumed name of Henry Ford Health Systems: Henry Ford Medical Center. This entity is a direct continuity of the enterprise and a final merged or consolidated entity. All of its holdings "de facto" merged into its parent - Henry Ford Health System including goodwill, building, assets and all

patients. The continuity of the enterprise and dissolution of the sub are the primary "guidelines" and "only guidelines" as to whether successor liability doctrine applied, and the court may apply successor liability even in the absence of an established de facto merger, which was once again endorsed in Haney v Bendix Corp., 88 Mich App 747; 279 NW2d 544 (1979). In Haney, at page 751, the Court of Appeals noted as follows:

> We do not interpret Turner as standing for the proposition that plaintiff establish a de facto merger before successor liability attaches. Rather the stated requirements are only guidelines. The availability of the transferor corporation is simply a factor in determining continuity. It is not an independent prerequisite to the imposition of liability. Continuity and dissolution may be the prerequisites when a de facto merger is involved. **When a sale of assets for cash is involved, continuity alone is the test.**

If constructive merger doctrine under Turner does not apply to Hospitals or health care corporate entities, then all they need to do is reorganize and dissolve periodically to sever liability. They needn't even continue to carry insurance known as a "tail." This "de facto" limit on liability would remain available to any corporate entity who so reorganizes and dissolves, even when and if the surviving entity, as in this case,is the entity into which everything is absorbed and merged.

Policy arguments were argued vigorously by plaintiff's counsel at 318a-319a. Counsel made it clear that in the day and age of carnivorous health care acquisitions and closures, and rapidly changing health care relationships, the reality is that it is the patient [files] and goodwill that are purchased in sales of practices

and clinics in order to derive profit. More and more patients are assigned or attached to health care institutions, not personal physicians. This disruptive interference on a patient's continuity of care can be no more exemplified than with the history of Henry Ford Health System Now they want special treatment and to be recognized as an exception to established mergers and acquisition doctrine about which they knew when they conducted themselves this way.

For the appellant to now assert, on behalf of Henry Ford, that since a group of physicians formed a new entity (APMC, P.C.) in 1986, discontinuously and outside the loop of the former corporation purchased by Henry Ford, that Henry Ford somehow didn't directly acquire and succeed to a health care clinic business in Taylor ala Turner, is a whopper that this court should not swallow. Regardless, this was a finding of fact made by the lower court which cannot be overturned absent clear error. Precopio v City of Detroit, 415 Mich 457, 465-467; 330 NW2d 802 (1982)

IV. CONCLUSION AND REQUESTED RELIEF

For all of the reasons stated, in conjunction with the Brief on Appeal filed in this matter already with respect with Oakwood, anticipated to be filed with respect to Dr. Gennaoui and Associated Physicians, Plaintiff-Appellee respectfully requests that this Court deny all aspects of Henry Ford's appeal and sustain the decisions by the Court of Appeals and the lower court of this great State.

Respectfully Submitted,

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By: _____

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